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Supreme Court Update

2005-2006 Term

Search & Seizure – Consent

Georgia v. Randolph
--- U.S. --- (2006) (slip opinion)

FACTS: Scott and Janet Randolph were a married couple living in Americus, Georgia. They separated in May 2001 over marital difficulties, with Janet going to Canada with their son to live with her parents. Some time later, Janet and the child returned. It is unclear whether her return was for the purpose of seeking reconciliation or to recover additional property. If it was to seek reconciliation, it did not go well. On the morning of July 6, 2001, Janet called the police because Scott had taken their son away.

When the police arrived, Janet not only advised them of their marital difficulties and Scott's taking of their son, she also told them Scott was a cocaine user. After Scott returned, and the boy was subsequently recovered by officers (he had been left with a friend), the officers asked Scott about the drug use. Scott denied it. Janet told the officers that there were items of drug evidence in the house. When the officers asked Scott if they could search his home, he emphatically refused permission. The officers then asked Janet, who not only gave permission to search the home, but led them upstairs to Scott's room. An officer observed and seized a drinking straw with apparent cocaine residue on it. The officer went to his cruiser to get an evidence bag for the straw, but when he returned to the house Janet revoked her permission. A search warrant was obtained, and additional drug evidence was seized. Scott was indicted for possession of cocaine.

At trial, Scott moved to suppress the evidence as products of a warrantless search, arguing that his wife's consent was negated by his unequivocal refusal was overruled. The trial court found that Janet had common authority to consent

to the search. The Court of Appeals of Georgia reversed on the ground that the "consent to conduct a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant who is physically present at the scene to permit a warrantless search." The Supreme Court of Georgia affirmed, distinguishing the case from United States v. Matlock[1] as in Matlock the consent of the person with common authority was valid against the absent party. The Government appealed, and the U.S. Supreme Court granted certiorari.

ISSUE: Is the warrantless search and seizure of evidence lawful when the search is based on the consent of a person with common authority over the area searched with another person, and that other person is present and expressly refuses consent?

HOLDING: No.

DISCUSSION: The Court noted that in its previous cases of consent of a person with common authority, the second occupant was not physically present and objecting to the search. Common authority is not synonymous with technical property interest, but occurs when any of the cohabitants has a right to permit inspection of common areas. Cohabitants assume the risk that one of them may permit such an inspection. Common authority for the purposes of the Fourth Amendment may be broader than the rights accorded under property law. "The constant element in assessing Fourth Amendment reasonableness in consent cases, then, is the great significance given to widely shared social expectations, . . . influenced by the law of property, but not controlled by its rules."

The Court then addressed what it described as "assumptions tenants usually make about their common authority when they share quarters." Among them would be that a roommate might invite in a guest that the other finds objectionable. Also, while a co-tenant may share authority over common areas, they would not likely have authority to let officers search the personal belongings of another. The Court invoked Minnesota v. Olson[2] for the proposition that overnight houseguests have a legitimate expectation of privacy in their quarters since it would be unlikely that their host would admit somebody to their space over their objection. From this, the Court presumed that an inhabitant of shared space would likewise be able to prevent the other from inviting an unwanted person over his objection. It concluded that there was "no common understanding that one cotenant generally has a right or authority to prevail over the express wishes of another, whether the issue is the color of the curtains or invitations to outsiders." Therefore, since a co-tenant has no recognized authority in law or social practice to prevail over a present and objecting co-tenant, the disputed invitation to a police officer to come in and search is negated by the objection of the other.

[1] 415 U.S. 164 (1974)
[2] 495 U.S. 91 (1990)

The Court disagreed with the contention that this decision would shield domestic abusers by allowing the violator to trump the permission of the victim to enter the dwelling. Defending its holding, the Court said that was confusing two separate issues - when you can enter to do a search, and when you can enter for other reasons without committing a trespass. The Court stressed that this decision applied to contested consent to search cases. "No question has been raised, or reasonably could be, about the authority of the police to enter a dwelling to protect a resident from domestic violence; so long as they have good reason to believe such a threat exists, it would be silly to suggest that the police would commit a tort by entering, say, to give a complaining tenant the opportunity to collect belongings and get out safely, or to determine whether violence . . . has just occurred or is about to . . . occur, however much a spouse or other cotenant objected." In essence, an exigent circumstance (imminent domestic violence) would justify entry over any objection.

The Court concluded its opinion by wrapping up a couple of what it described as loose ends. First, it attacked the seeming contradiction from Matlock about a co-tenant having authority to give permission in his own right. This was explained as not being "an enduring and enforceable ownership right as understood by the law of private property" but as authority based on customary social usage that goes to the reasonableness requirement for the expectation of privacy. The second loose end was how this affected situations where the potentially objecting co-tenant was asleep (Illinois v. Rodriguez[3]), in the back yard, in a police vehicle, or any other circumstance where he would be close by or reachable. The Court said that so long as there was no evidence that the police have removed the potentially objecting party for the sake of pre-empting his opportunity to object, the consent of the other co-tenant would remain valid.

The U.S. Supreme Court upheld the decision of the Georgia Supreme Court.

LINK FOR FULL DECISION:
http://www.supremecourtus.gov/opinions/05pdf/04-1067.pdf

Search & Seizure - Anticipatory Warrants

U.S. v. Grubbs
--- U.S. --- (2006) (slip opinion)

FACTS: Grubbs had ordered a videotape of child pornography on the Internet from what turned out to be an undercover postal inspector. Postal inspectors submitted an application for a search warrant for Grubbs' home to seek the videotape. The affidavit stated that the warrant would not be executed unless and until the videotape had been received by a person at the address in

[3] 497 U.S. 177 (1990)

question. The affidavit concluded that based on the information set forth the item would be found at the stated address after it was delivered by the USPS. A postal inspector delivered the package and Grubbs' wife signed for it. Postal inspectors detained Grubbs when he left the house shortly thereafter, and they executed the warrant. Grubbs was given a copy of the warrant, but it did not have the affidavit attached that explained when the warrant would be executed The videotape was found, and Grubbs was arrested after he admitted ordering it.

Grubbs sought suppression of the tape in District Court on the basis that the warrant failed to list the triggering condition. The District Court denied the motion. Grubbs pleaded guilty, but reserved his right to appeal the denial of the motion to suppress. The Ninth Circuit reversed, holding that the particularity requirement of the Fourth Amendment applied to conditions precedent to an anticipatory search warrant. Because the officers failed to present a document with the anticipatory condition listed, the warrant was held to be invalid.

The Government appealed, and the U.S. Supreme Court granted certiorari.

ISSUE: Is an anticipatory search warrant invalid if it fails to state the triggering condition on the actual warrant?

HOLDING: No.

DISCUSSION: Although it was not an issue preserved by appeal, the Court first addressed the question of whether anticipatory search warrants were categorically unconstitutional, and the Court held that they were not. The Court noted that most anticipatory warrants have a "triggering condition" that must be met before the warrant could be executed. The Court noted that when a warrant is ordinarily issued, the magistrate does so in anticipation that the item will still be there when the warrant is executed. It also noted that a wiretap warrant is issued in anticipation that incriminating communications will be intercepted, but they have not happened yet. Anticipatory warrants are issued with the expectation that the contraband will be there when the warrant is executed. They were held to be no different that ordinary warrants, in that they require the magistrate to determine that it is now probable that contraband, evidence of a crime, or a fugitive *will be* on the described premises when the warrant is issued. It must be probable that if the triggering condition occurs, evidence of a crime will be found, and it must also be probable that the triggering condition <u>will</u> occur.

The Court disposed of the Ninth Circuit's actual reasoning relatively quickly, rejecting the Ninth's effort to expand the application of the phrase "particularly described" to include more than the Fourth Amendment's actual application to the location to be searched and the items to be seized. It rejected outright the Grubbs' contention that if there were a precondition to the validity of the warrant, it must be stated on the face of the warrant.

The Court reversed the decision of the Ninth Circuit, and upheld Grubbs' original plea.

LINK FOR FULL DECISION:
http://www.supremecourtus.gov/opinions/05pdf/04-1414.pdf

Search & Seizure – Exigent Entry

Brigham City, Utah v. Stuart
--- U.S. --- (2006) (slip opinion)

FACTS: On July 23, 2000, at about 3 a.m., four Brigham City officers were dispatched to a loud party and "an altercation occurring, some kind of fight." When they arrived, "they heard shouting from inside, and proceeded down the driveway to investigate." They saw "two juveniles drinking beer in the backyard." Entering the backyard, the officers saw through the screen door and the windows, "an altercation taking place in the kitchen" – specifically "four adults … attempting, with some difficulty, to restrain a juvenile." As they watched, the juvenile "broke free, swung a fist and struck one of the adults in the face." (The blow was sufficient to cause the individual struck to spit blood into the nearby sink.) The fight continued, with the adults pushing the juvenile into the refrigerator so hard that the refrigerator moved. The officers opened the back door and announced their presence but "[a]mid the tumult, nobody noticed." However, as the participants to the fight "slowly became aware that the police were on the scene, the altercation ceased."

The officers arrested the adults (Stuart and his fellow defendants) for "contributing to the delinquency of a minor, disorderly conduct, and intoxication." They moved for suppression, "arguing that the warrantless entry violated the Fourth Amendment" and that the arrest was thus invalid.

The Utah state courts (from the trial court to the Utah Supreme Court) found that the officers' entry was not reasonable and suppressed the arrest. The Utah Supreme Court found that the "juvenile's punch was insufficient to trigger the so-called 'emergency aid doctrine' because it did not give rise to an 'objectively reasonable belief that an unconscious, semi-conscious, or missing person feared injured or dead [was] in the home.'" (In the alternative, the Court found that because the officers did not seek "to assist the injured adult, but instead had acted 'exclusively in their law enforcement capacity'" that the arrest was also invalid.) The Utah Court further found that the "entry did not fall within the exigent circumstances exception to the warrant requirement" in that a reasonable person would not have believed the entry was necessary under the circumstances. Although the Utah Supreme Court found it to be a "close and difficult call," it found that the "officers' entry was not justified by exigent circumstances."

The Government appealed, and the U.S. Supreme Court granted certiorari.

ISSUE: May law enforcement officers enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with serious injury?

HOLDING: Yes

DISCUSSION: The Court agreed that it is a "basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable."[4] However, the "warrant requirement is subject to certain exceptions" and the Court detailed several such exceptions. The Court noted, that "[o]ne exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury."[5]

Stuart (and his fellow defendants) did "not take issue with these principles, but instead advance[d] two reasons why the officers' entry here was unreasonable." First, they argued "that the officers were more interested in making arrests than quelling violence" – and not interested, primarily, "by a desire to save lives and property." The Utah courts considered the officers' subjective motivations to be relevant, but U.S. Supreme Court precedent has "repeatedly rejected this approach." In Bond v. U.S., the Court had held that the "subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment …: the issue is not his state of mind, but the objective effect of his actions."[6] As such, the Court held that is "does not matter here – even if [the officers'] subjective motives could be so neatly unraveled – whether the officers entered the kitchen to arrest respondents and gather evidence against them or to assist the injured and prevent further violence."[7]

Stuart "further contend[ed] that their conduct was not serious enough to justify the officers' intrusion into the home," relying on Welsh v. Wisconsin.[8] The Court, however, found that the "officers were confronted with *ongoing* violence occurring *within* the home," not the situation in Welsh, when the officers entered a residence seeking only to preserve evidence of a DUI.

The Court found the "officers' entry … plainly reasonable under the circumstances." Continuing, the Court noted that "the officers had an objectively reasonable basis for believing both that the injured adult might need help and

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[4] Groh v. Ramirez, 540 U.S. 551 (2004), quoting Payton v. New York, 445 U.S. 573 (1980)
[5] Quoting Mincey v. Arizona, 437 U.S. 385 (1978)
[6] 529 U.S. 334 (2000); see also Scott v. U.S., 436 U.S. 128 (1978), Whren v. U.S., 517 U.S. 806 (1996) and Graham v. Connor, 490 U.S. 386 (1989)
[7] The court did, however, differentiate that in the "context of programmatic searches conducted without individualized suspicion – such as checkpoints to combat drunk driving or drug trafficking – that 'inquiry into programmatic purpose' is sometimes appropriate." Indianapolis v. Edmond, 531 U.S. 32 (2000); Florida v. Wells, 495 U.S. 1 (1990)
[8] 466 U.S. 740 (1984)

that the violence in the kitchen was just beginning." From the din inside, the Court agreeing that "'knocking on the front door'… would have been futile."

The Court further found that the "manner of the officers' entry was also reasonable." Once they witnessed the fight, "one of the officers opened the screen door and 'yelled in police.'" When it became apparent that "nobody heard him, he stepped into the kitchen and announced himself again" and "[o]nly then did the tumult subside." The Court considered his announcement the "equivalent of a knock" and "[i]ndeed, it was probably the only option that even had a chance of rising above the din." Waiting for a response would have "serve[d] no purpose," and nothing "require[d] them to stand dumbly at the door awaiting a response while those within brawled on, oblivious to their presence."

The Court found that "[n]othing in the Fourth Amendment required [the officers] to wait until another blow rendered someone 'unconscious' or 'semi-conscious' or worse before entering" and that the "role of a peace officer included preventing violence and restoring order, not simply rendering first aid to casualties; an officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided."

The U.S. Supreme Court reversed the decision of the Utah state courts, and remanded the case for further proceedings.

NOTE: Stating that this was an "odd flyspeck of a case, Justice Stevens concurred in the result, but submitted a separate opinion. He puzzled that the outcome was ever in doubt, given the well-settled state of the law in this area, although he further stated that it was possible that the suppression was correct under Utah law, even though nothing in the submitted briefs so identified "the Utah Constitution as an independent basis for the decision."

LINK FOR FULL DECISION:
http://www.supremecourtus.gov/opinions/05pdf/05-502.pdf

Samson v. California
--- U.S. --- (2006) (slip opinion)

FACTS: In September, 2002, "Samson was on state parole in California." Officer Rohleder (San Bruno PD) spotted Samson "walking down a street with a woman and a child." Rohleder recognized Samson and thought "he was facing an at large warrant." Rohleder stopped Samson and asked him, but Samson replied that he had nothing outstanding. Rohleder confirmed this was the case, but pursuant to California law, "and based solely on [Samson's] status as a parolee, Officer Rohleder searched [Samson]." Rohleder found a cigarette box containing methamphetamine.

Samson was charged with possession, and he requested suppression, arguing that the search was improper. The trial court found that the search was "not 'arbitrary or capricious'" and denied the suppression, and eventually, Samson was convicted. He appealed, and the California appellate courts affirmed. Samson requested, and was granted certiorari, by the U.S. Supreme Court.

ISSUE: Does the Fourth Amendment prohibit California police from conducting a warrantless search of a person who is subject to a parole search condition, where there is no suspicion of criminal wrongdoing and the sole reason for the search is that the person is on parole?

HOLDING: No

DISCUSSION: The Court granted certiorari "to answer a variation of the question [the] Court left open in" U.S. v. Knights[9]" – "whether a condition of release can so diminish or eliminate a released prisoner's reasonable expectation of privacy that a suspicionless search by a law enforcement officer would not offend the Fourth Amendment."

The Court reviewed its decision in Knights, which involved a probationer, not a parolee, as in this case.[10] California law requires both probationers and parolees, as a rule, to agree to submit to searches at any time. However, in Knights' case, officers did, in fact, have at least reasonable suspicion that he had been involved in a crime. In Knights, the Court "concluded that probation searches, such as the search of Knights' apartment, are necessary to the promotion of legitimate governmental interests" and that it is assumed that a probationer "is more likely than the ordinary citizen to violate the law." In addition, a probationer has "even more of an incentive to conceal their criminal activities" since they risk revocation and a return to prison if caught.

In this case, the Court noted that "parolees are on the 'continuum' of state-imposed punishments." Further "[o]n this continuum, parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment" and the "essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abides by certain rules during the balance of the sentence." Samson "signed an order submitting to the condition and thus was 'unambiguously' aware of it."

The opinion noted that the majority of other states, and the federal government, "have been able to further similar interests in reducing recidivism and promoting

[9] 534 U.S. 112 (2001)

[10] Probation is generally given instead of incarceration, while parole is an early release from imprisonment, and an individual is considered to be a "prisoner" for the duration of their original sentence.

re-integration, despite having systems that permit parolee searched based upon some level of suspicion." However, the Court found that to be of "little relevance to [its] determination" since California law does prohibit searches that are "arbitrary, capricious or harassing."

The Court held that "the Fourth Amendment does not prohibit a California police officer from conducting a suspicionless search of a parole" and it affirmed Samson's conviction.

NOTE: Kentucky does not have a statute equivalent to that discussed in this case that permits such searches. Kentucky Probation and Parole policies and Kentucky case law appear to require, at a minimum, reasonable suspicion before such searches may be performed.

LINK FOR FULL DECISION:
http://www.supremecourtus.gov/opinions/05pdf/04-9728.pdf

EVIDENCE – TESTIMONIAL STATEMENTS (CRAWFORD)

Davis v. Washington
--- S.Ct. --- (2006) (slip opinion)

NOTE: The cases of Davis v. Washington and Hammon v. Indiana were consolidated and argued before the U.S. Supreme Court in the same proceeding.

FACTS: In the first case, Davis, on February 1, 2001, Michelle McCottry made an emergency call to a local 911 operator. (In fact, she disconnected the call before she spoke, but the 911 operator was able to reverse the call and reach her.) McCottry related that she "was involved in a domestic disturbance with her former boyfriend Adrian Davis" – the defendant. Before the officers arrived, Davis fled. The officers talked to McCottry within minutes of the call and "observed [her] shaken state, the 'fresh injuries on her forearm and her face,' and her 'frantic efforts to gather her belongings and her children so that they could leave the residence.'" Eventually, Davis was charged with a "felony violation of a domestic no-contact order."

McCottry, however, for reasons not explained in the opinion, did not appear at trial, and the only witnesses were the two responding police officers. Over Davis's objection, the trial court admitted the recording of the 911 call, in which McCottry identified Davis as her attacker, and eventually, Davis was convicted. The Washington Court of Appeals and the Washington Supreme Court each affirmed the decision of the trial court, agreeing that the "portion of the 911

conversation in which McCottry identified Davis was not testimonial," and thus not prohibited under Crawford v. Washington.[11]

In the second case, Hammon, "police responded late on the night of February 26, 2003, to a 'reported domestic disturbance' at the home of Hershel and Amy Hammon." When they officers arrived, they "found Amy alone on the front porch." She appeared "somewhat frightened," but told the officers that "nothing was the matter." She allowed them into the house, and they found a "gas heating unit" with the front glass broken, and pieces of glass on the floor in front of the unit. (Flame was coming through the broken panel, as well.) Hershel was in the kitchen, and he told the officers that the two had been in an argument but that it "never became physical." The officers tried to talk to the two separately, but Hershel kept trying to "participate in Amy's conversations with the police," and "became angry" when the officer kept them separated. Eventually, the officer had Amy "fill out and sign a battery affidavit." She handwrote the following:

> Broke our Furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn't leave the house. Attacked my daughter.

Hershel was charged with domestic battery and violating his probation. Amy did not appear (as ordered) at the trial. (Apparently, she invoked the marital privilege and could not be required to testify against her husband.) The officer who took the affidavit was "asked … to recount what Amy told him and to authenticate the affidavit." (The prosecutor defended the affidavit as being made "under oath[12]," but the defense counsel vigorously objected to the introduction of the affidavit, because it did not give him the opportunity to cross examine the affiant.)

The trial court admitted the document as a "present sense impression" and Amy's statements (apparently to the officer) as "'excited utterances' that 'are expressly permitted in these kinds of cases even if the declarant is not available to testify.'" (The officer related what Amy had told him as to the reason for the argument, and what she told him of Hershel's actions in the assault.)

Hershel Hammon was found guilty by the trial court. Upon appeal, the Indiana appellate courts both affirmed, finding that Amy's statement was admissible as an excited utterance, and not testimonial, as it was not "given or taken in significant part for purposes of preserving it for potential future use in legal proceedings" and in a situation where "the motivations of the questioner and declarant are the central concerns." The appellate courts further agreed that the

[11] 541 U.S. 36 (2004)

[12] It should be noted that as a rule, a statement given to law enforcement at the scene will not be considered to be "under oath" – subjecting the individual to perjury – as Kentucky law does not automatically grant to law enforcement officers the ability to place someone under oath. In Kentucky, the ability to take an oath from an individual is governed by KRS 62.020.

affidavit was, in fact, "testimonial and thus wrongly admitted, it was harmless beyond a reasonable doubt, largely because the trial was to the bench."[13]

In both cases, the convictions were appealed, and the U.S. Supreme Court granted certiorari.

ISSUE: 1) Is an alleged victim's statement to a 911 operator, naming an assailant, a "testimonial statement" within the meaning of Crawford?

2) Is an oral accusation made to an investigating officer at the scene of an alleged crime, but after the fact, a testimonial statement within the meaning of Crawford?

HOLDING: 1) No
2) Yes

DISCUSSION: In 2004, the U.S. Supreme Court handed down the opinion of Crawford v. Washington.[14] Since that time, numerous cases in the lower state and federal courts have argued the meaning and ramifications of the definition of a prohibited "testimonial statement." The Court noted that "[o]nly statements of this sort cause the declarant to be a 'witness' within the meaning of the Confrontation Clause."

The Court began its opinion by the following:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purposes of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

The Court noted that "the facts of [the Crawford case spared us the need to define what we meant by 'interrogations," but the "Davis case today does not permit us this luxury of indecision."

The Court reviewed the litigation invoking the Confrontation Clause over the years. It noted that most of the previous cases "involved testimonial statements of the most formal sort – sworn testimony in prior judicial proceedings or formal depositions under oath" but that earlier, English, cases "did not limit the exclusionary rule to prior court testimony and formal depositions." The Court did not "think it conceivable that the protections of the Confrontation Clause can

[13] A bench trial, as opposed to a jury trial.
[14] Id.

readily be evaded by having a note-taking policeman recite the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition."

The Court found that an interrogation "solely directed at establishing the facts of a past crime" … "whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial." "A 911 call, on the other hand, and at least the initial interrogation conducted on connection with a 911 call, is ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance."

In Davis, the Court looked at three points. First, "McCottry was speaking about events *as they were actually happening*, rather than 'describ[ing] past events,'" that occurred hours before. Second, "McCottry's call was plainly a call for help against bona fide physical threat" and "any reasonable listener would recognize that McCottry … was facing an ongoing emergency." Third, "the nature of what was asked and answered in Davis, again viewed objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in Crawford) what had happened in the past," even though the 911 operator was attempting "to establish the identify of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon." Finally, "McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe," rather than in a calm environment, as that in the Crawford case.

The Court concluded that "the circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency," and that "[s]he simply was not acting as a *witness*; she was not *testifying*."

However, the Court agreed with the Indiana Supreme Court that "a conversation which begins as an interrogation to determine the need for emergency assistance" may "evolve into testimonial statements." In Davis, once Davis drove away, the call-taker "proceeded to pose a battery of questions," and the Court concurred that "[i]t could readily be maintained that, from that point on, McCottry's statements were testimonial, not unlike the 'structured police questioning' that occurred in Crawford." The Court found that the trial courts could readily deal with such statements, through pretrial proceedings, and if necessary, redact the inadmissible portions of such statements.

In Hammon, the Court found it to be "entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct." The Court noted that "[t]here was no emergency in progress" and "the interrogating officer testified that he had heard no arguments or crashing and saw no one throw or break anything." When the officer pressed Amy "for the

second time, and elicited the challenged statements, he was not seeking to determine (as in Davis) 'what is happening,' but rather 'what happened.'" Looking at the situation objectively, "the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime – which is, of course, precisely what the officer *should* have done." Like Crawford, Amy's statement "deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed." Both took place in rooms where the parties were separated both from the occurrence and from other parties and "both took place some time after the events described were over." As such, both were "inherently testimonial."

The Court acknowledged that a number of amici curiae[15] parties have "contend[ed] that the nature of the offenses charged in these two cases – domestic violence – requires greater flexibility in the use of testimonial evidence," because "[t]his particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial." The Court agreed that "[w]hen this occurs, the Confrontation Clause gives the criminal a windfall." However, the Court concluded that it could "not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free." The Court found that when defendants attempt to coerce "silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce," and that "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation."

The Court "determined that, absent a finding of forfeiture by wrongdoing, the Sixth Amendment" required the exclusion of Amy Hammon's affidavit.

The Supreme Court affirmed the ruling of the Washington Supreme Court and upheld Davis's conviction, but reversed the ruling of the Indiana Supreme Court and remanded the Hammon case for further proceedings.

LINK FOR FULL DECISION:
http://www.supremecourtus.gov/opinions/05pdf/05-5224.pdf

Constitutional Law - First Amendment

Garcetti v. Ceballos
--- U.S. --- (2006) (slip opinion)

FACTS: Ceballos was, during all times relevant to the case, a deputy district attorney in the Los Angeles area. He was the calendar deputy, a first level supervisor over trial attorneys in February, 2000, when a defense attorney brought to him a concern that an arresting deputy sheriff "may have lied in a search warrant affidavit." Ceballos investigated (his job duties included that

[15] Friend of the Court – a brief filed by a non-party who has a strong interest in or views on the subject matter of the action.

responsibility) the claim and came to the conclusion that the deputy had "at the least, grossly misrepresented the facts."

Ceballos discussed the matter with his supervisor and, ultimately, others higher in his chain of command and "[e]veryone agreed that the validity of the warrant was questionable." Ceballos wrote a memorandum to the Head Deputy District Attorney, Sundstedt, "discussing the determination that the affidavit was falsified and recommending that the case be dismissed." He revised the memo at Sundstedt's direction to "make it less accusatory of the deputy sheriff." They then met with representatives of the Sheriff's Department on the matter.

Following that meeting, Sundstedt "was not certain that the [case] should be dismissed and decided to proceed with the case pending the outcome of a motion challenging the search warrant, which had already been filed by the defense." Because of his previous discussions with defense counsel, Ceballos was called as a witness for the defense, and he also told his agency that "pursuant to Brady v. Maryland[16] and other case law, he was obligated to turn over to the defense the memoranda he had prepared regarding his opinion of the legality of the search warrant." He was instructed to edit the memorandum and to "limit his in-court testimony." At the hearing, certain questions he was asked were not permitted by the court, and ultimately "as a result, he was unable to tell the court certain of his conclusions (and the reasons therefore) regarding the accuracy of the warrant." (The suppression was denied, and ultimately, the defendant was convicted.)

Following this situation, "Ceballos alleges that Garcetti, Sundstedt, and Najera retaliated against him for submitting the memorandum" and for other actions he took regarding the case, in that he was demoted and assigned to a distant branch of the office, and relegated to trying lesser cases. He filed suit against those parties under 42 U.S.C. §1983, arguing a First Amendment violation.

The District Court summarily dismissed the case, finding that the parties were protected by qualified immunity. The Ninth Circuit affirmed that decision. Ceballos requested, and was granted, certiorari by the U.S. Supreme Court.

ISSUE: Is a government employee's speech subject to First Amendment protections when it concerns a matter of general public concern?

HOLDING: Yes

DISCUSSION: The Court started by stating that "[a]lthough public employees do not relinquish their right to free speech by virtue of their employment, neither do they enjoy absolute First Amendment Rights." To determine if speech is protected, a court must look to Connick v. Myers[17] and Pickering v. Bd. of Educ.[18]

[16] 373 U.S. 83 (1963)
[17] 461 U.S. 138 (1983)

and ask if first, "the speech addresses a matter of public concern" and second, using the Pickering balancing test, "determine whether [the employee's] interest in expressing himself outweighs the government's interests 'in promoting workplace efficiency and avoiding workplace disruption.'"

Speech addresses a matter of public concern if it "relates to an issue of 'political, social, or other concern to the community.'"[19] The court distinguishes between "speech 'as a citizen upon matters of public concern' at one end and speech 'as an employee upon matters only of personal interest' at the other end." In other words, the court looks at the point of the employee in making the statements, and found that, in this case, it was to bring "wrongdoing to light." Lower court cases had emphasized that "speech exposing official wrongdoing is no less deserving of First Amendment protection because the public employee reported the misconduct to his supervisors rather than to the news media." In fact, the court noted, the rule proposed by the District Attorney's Office "would be particularly detrimental to whistle-blowers … who report official misconduct up the chain of command, because all public employees have a duty to notify their supervisors about any wrongful conduct of which they become aware." If the Court were to hold otherwise, it would "deprive public employees of constitutional protection when they fulfill this employment obligation, while affording them protection if they bypass their supervisors and take their tales, for profit or otherwise, directly to a scandal sheet or to an internet political smut purveyor" and that "defies sound reason."

The Court noted, however, that even if Ceballos's speech "constituted a matter of public concern, "it is not protected by the First Amendment unless the court also finds that his interest in the speech outweighs the government's interests," as indicated in the Pickering test. However, the Court found that Ceballos did exactly the right thing, sending his concerns up through his chain of command and that his action was done in a "good faith whistleblowing context." Even though the trial court ultimately admitted the warrant, and his concerns were "purportedly erroneous" the District Attorney's Office simply "offer[ed] no explanation as to how Ceballos's memorandum to his supervisors resulted in inefficiency or office disruption," as he was simply "doing his job by investigating allegations of law enforcement misconduct in a case being prosecuted under his direction and reporting those that appeared to be meritorious to his supervisors."

The Court found that Ceballos's speech was protected speech under the First Amendment. However, to defeat summary judgment, it is also necessary to find that the constitutional violation was clearly established at the time of the action. The Court quickly found that the law, favoring Ceballos, was well-decided at the time of the incident. Further, the Court agreed that the actions by the District Attorney's Office were objectively unreasonable. It is possible, the Court noted, that the defendants "will be able to show at trial that the adverse acts Ceballos

[18] 391 U.s. 563 (1968)
[19] Brewster v. Bd. of Educ. of the Lynwood Unified Sch. Dist. 149 F.3d 971 (9th Cir. 1998)

alleges were not taken in retaliation for constitutionally protected speech" but that cannot be resolved except at trial. Simply put, "[r]etaliatory motives do not constitute a sound basis for employment decisions."

The Court reversed the decision and remanded the case for further proceedings.

LINK FOR FULL DECISION:
http://www.supremecourtus.gov/opinions/05pdf/04-473.pdf

Hartman v. Moore
--- U.S. --- (2006) (slip opinion)

FACTS: During the 1980s, Moore was the CEO of REI, a manufacturer that was developing a multiline optical character reader. The invention might prove useful to the U.S. Postal Service (USPS), among other entities, but at that time the USPS was focusing on encouraging the use of the nine digit (single line) zip code, instead. In 1985, however, under lobbying by REI, among others, the USPS "embraced multiline technology," but the contract went to a competing company.

Moore and REI "were soon entangled in two investigations by Postal Service inspectors" – including one involving kickbacks to government officials. Moore and REI were criminally charged, but ultimately, received a directed verdict at trial, with the trial court finding no direct evidence that they were involved in any criminal wrongdoing.

Moore sued the prosecutor and the postal inspectors, under a Bivens[20] action, complaining that they had "engineered his criminal prosecution in retaliation for criticism of the Postal Service, thus violating the First Amendment." The Assistant U.S. Attorney (AUSA) was dismissed under absolute immunity, and eventually, the inspectors moved for summary judgment and dismissal of the case, arguing that "the underlying criminal charges were supported by probable cause" and thus they were entitled to qualified immunity. The District of Columbia Court of Appeals affirmed the denial of qualified immunity, and the U.S. Supreme Court, upon request, granted certiorari.

ISSUE: Is a showing of the absence of probable cause an essential element in a retaliatory prosecution case?

HOLDING: Yes

DISCUSSION: The Court began by stating that "[o]fficial reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the

[20] Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). This is the equivalent civil rights action, for federal officials, to one taken under 42 U.S.C. §1983 for state and local officials.

protected right.'"[21] Further, the Court stated that "[s]ome official actions adverse to such a speaker might well be unexceptionable if taken on other grounds, but when nonretaliatory grounds are in fact insufficient to provoke the adverse consequences, we have held that retaliation is subject to recovery as the but-for cause of official action offending the Constitution."

For Moore to succeed, the Court found "the need to prove a chain of causation from animus to injury, with details specific to retaliatory-prosecution cases, that provides the strongest justification for the no-probable-cause requirement espoused by the inspectors."

The Court reviewed a number of cases in which individuals (both government employees and other citizens) have alleged that a government entity/employee has retaliated against them, in some way, for their protected speech. The court found it to be clear "that the causation is understood to be but-for causation, without which the adverse action would not have been taken" and said that "upon a prima facie showing of retaliatory harm, the burden shifts to the defendant official to demonstrate that even without the impetus to retaliate he would have taken the action complained of (such as firing the employee). The Court agreed that "action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway."

In a case of this nature, however, when there is a criminal prosecution, "there will always be a distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation, namely evidence showing whether there was or was not probable cause to bring the criminal charge." A showing of no probable cause "will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for instigating the prosecution, while establishing the existence of probable cause will suggest that prosecution would have occurred even without a retaliatory movie. For both Bivens defendants and those state or local officials being sued under 42 U.S.C. §1983, "litigating probable cause will be highly likely in any retaliatory-prosecution case, owing to its powerful evidentiary significance."

The Court noted that such actions cannot be brought against the prosecutor (who will be statutorily immune) but "[i]nstead, the defendant will be a non-prosecutor, an official, … who may have influenced the prosecutorial decision but did not himself make it, and the cause of action will not be strictly for retaliatory prosecution, but for successful retaliatory inducement to prosecute." Therefore, "the causal connection required here" … is …"between the retaliatory animus of one person and the action of another." There is a "factual difficulty [in] divining the influence of an investigator or other law enforcement officer upon the prosecutor's mind," particularly when there is also the "longstanding presumption … regularly accorded to prosecutorial decisionmaking," something the Court was

[21] Crawford-El v. Britton, 523 U.S. 574 (1998), also see Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274 (1977)

not willing to "lightly discard, given [its] position that judicial intrusion into executive discretion of such high order should be minimal."

The Court reversed the lower court and granted qualified immunity to the USPS inspectors, finding that it made sense to plead and prove the absence of probable cause before allowing the case to proceed, and to consider it an essential element of the cause of action, because such a showing is essential to proving the case ultimately at trial.

LINK FOR FULL DECISION:
http://www.supremecourtus.gov/opinions/05pdf/04-1495.pdf

Sanchez-Llamas v. Oregon
--- U.S. --- (2006) (slip opinion)

FACTS: In December, 1999, Sanchez-Llamas, a Mexican national, was "involved in an exchange of gunfire with [Oregon] police in which one officer suffered a gunshot wound in the leg." He was promptly arrested and given his *Miranda* warnings, but he was not informed of his right to "have the Mexican Consulate notified of his detention."

Shortly thereafter, he was interrogated, with the assistance of an interpreter, and he "made several incriminating statements regarding the shootout with police." He was charged with several serious felonies, including attempted aggravated murder. Sanchez-Llamas requested suppression prior to trial, "because the statements were made involuntarily and because the authorities had failed to comply with Article 36 of the Vienna Convention (VCCR)" but the trial court denied the motion. Sanchez-Llamas was convicted. He appealed, arguing that the VCCR "required suppression of his statements," but the Oregon appellate courts affirmed the conviction. Specifically, the Oregon Supreme Court concluded that the VCCR "does not create rights to consular access or notification that are enforceable by detained individuals in a judicial proceeding."

Sanchez-Llamas appealed, and the U.S. Supreme Court granted certiorari.

In December, 1997, Bustillo, a Honduran national, was involved in an altercation in Springfield, Virginia that resulted in the death of Merry. Bustillo was arrested, but he was "never informed … that he could request to have the Honduran Consulate notified of his detention." Eventually, he too was convicted, and his conviction was affirmed by the state courts. He did not raise the issue of the VCCR, however, until his writ of habeas corpus, and that writ was supported by an affidavit from the Honduran Consulate that "it would have endeavoured to help Mr. Bustillo in his defense" had they been notified of his detention prior to trial. (He also argued a claim of "ineffective assistance of counsel" in that his attorney did not advise him of his VCCR rights, either.) The Virginia courts held

the claim to be procedurally barred because it was not raised at the appropriate time in the appeal process, and let his conviction stand.

Bustillo appealed, and the U.S. Supreme Court granted certiorari.

The U.S. Supreme Court consolidated the two cases for argument, as they presented related issues upon appeal.

ISSUE: Is suppression of evidence an appropriate remedy for a failure to provide information to an arrested alien subject concerning their rights to consular notification?

HOLDING: No

DISCUSSION: Both defendants argued "that Article 36 grants them an individually enforceable right to request that their consular officers be notified of their detention, and an accompanying right to be informed by authorities of the availability of consular notification." Virginia and Oregon, and the United States, argued that the treaty should be "enforced through political and diplomatic channels, rather than through the courts." However, the Court found it unnecessary, at this point, to decide that issue, and left it for another day, as the case was decided against the two plaintiffs on different grounds.

The Court began by noting that "[i]t would be startling if the Convention were read to require suppression" as the "exclusionary rule … is an entirely American legal creation." Most, if not all, of the other signatory countries do not recognize suppression of evidence as a remedy. Oregon and the United States argued that the federal courts lack the legal authority over state-court proceedings to mandate suppression of such evidence in a state criminal case. Because the treaty itself did not mandate suppression, the Court agreed that suppression was not an appropriate remedy, but the Court did note that "it does require an appropriate judicial remedy of *some* kind."

The Court further notes that suppression, as a remedy, is "primarily to deter constitutional violations." In contrast, the violation of the right to consular notification … is at best remotely connected to the gathering of evidence," and has "nothing whatsoever to do with searches or interrogation." It does not "guarantee defendants *any* assistance at all." In fact, "police win little, if any, practical advantage from violating" the VCCR. Finally, the court noted, there are other ways to vindicate the right, as it can be raised as a challenge to the voluntary nature of any statements given, and if raised at the appropriate time, the trial court may make necessary accommodations to ensure that the consulate is, in fact, notified. In addition, the normal diplomatic avenues to enforce treaties may be utilized.

With regards to Bustillo's claim, the Court noted that the "general rule in federal habeas cases is that a defendant who fails to raise a claim on direct appeal is barred from raising the claim on collateral review." In previous cases on the issue, the Court has held that international law, "absent a clear and express statement to the contrary," requires that the "procedural rules of the forum State (country) govern the implementation of the treaty in that State."

The Court addressed Bustillo's claim that the International Court of Justice at The Hague (ICJ) "has interpreted the Vienna Convention to preclude the application of procedural default rules to Article 36 claims." While giving that court "respectful consideration," the Court ultimately concluded that "it does not compel [the Court] to reconsider [its] understanding of the Convention" as it had been interpreted in previous cases. The Court concluded that "claims under Article 36 of the Vienna Convention may be subjected to the same procedural default rules that apply generally to other federal law claims."

The Court upheld the convictions of both Sanchez-Llamas and Bustillo, but noted that its "holding in no way disparages the importance of the Vienna Convention."

NOTE: This case was decided on essentially a 5-4 split, with one Justice agreeing with the majority on one issue in the case and with the minority on another. In addition, although the Court found that suppression of the evidence is not necessarily the appropriate remedy for a violation, the Court recognized that remedies for such failures are necessary, and left open to the individual states to decide what such remedies should be. Individual states might choose to make suppression that remedy, or may simply permit a collateral lawsuit on the issue to go forward. Finally, with the increasing awareness of this issue, it should be anticipated that defense counsel will now be aware of the right, and they will be able to raise the issue at an earlier stage in the proceedings, thereby avoiding the procedural default that was the case in the Bustillo case. In any event, agencies should continue to ensure that such notifications are provided to arrested foreign nationals in a timely manner, as required by the treaty. For further information on this issue, law enforcement agencies may contact the DOCJT Legal Section, or go to http://travel.state.gov/law/consular/consular_636.html.

LINK FOR FULL DECISION:
http://www.supremecourtus.gov/opinions/05pdf/04-10566.pdf